

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JOSEPH WAREHAM,	)	
	)	
Plaintiff,	)	Civil Action No. 2: 13-cv-00188
	)	
v.	)	District Judge Arthur J. Schwab
	)	
PENNSYLVANIA DEPARTMENT OF	)	Magistrate Judge Cynthia Reed Eddy
CORRECTIONS; MR. JOSEPH	)	
MAZURKIEWICZ, MRS. LORI	)	
KWISNEK, DR. JOSEPH MOLLURA,	)	
PRISON HEALTH SERVICES,	)	
MRS. SUSAN BERRIER, MR. ERIC	)	
ARMEL, DR. MICHAEL HERBIK, AND	)	
DR. DENNIS J. PHILLIPS, individually	)	
and in their official capacities,	)	
	)	
Defendants.	)	

**MEMORANDUM ORDER**

Before the Court is the Report and Recommendation of the Magistrate Judge (ECF No. 59) recommending that the Motion to Dismiss filed by Defendant Dr. Dennis J. Phillips be granted. Objections to the Report and Recommendation have been lodged by Plaintiff, Joseph Wareham (ECF No. 67). The matter is ripe for disposition.

**Background**

The above captioned case was initiated by the filing of a motion to proceed *in forma pauperis* (ECF No. 1) on February 5, 2013, and was referred to United States Magistrate Judge Cynthia Reed Eddy for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rule 72. The Complaint avers, *inter alia*, that Defendant

Phillips demonstrated deliberate indifference to Plaintiff's serious medical needs by not pursuing the treatment plan he had recommended, namely surgery on Plaintiff's left knee.

On September 3, 2013, the Magistrate Judge filed a Report and Recommendation (ECF No. 59) recommending that the Motion to Dismiss filed by Defendant Phillips be granted. Objections to the Report and Recommendation were lodged by Plaintiff on September 27, 2013 (ECF No. 67).

For the reasons that follow, the objections filed by Plaintiff will be overruled, the Report and Recommendation will be adopted, and the Motion to Dismiss will be granted.

### **Standard of Review**

In disposing of objections to a magistrate judge's report and recommendation, the district court must make a *de novo* determination of those portions of the report to which objections are made. 28 U.S.C. § 636(b)(1)(C); *see also Henderson v. Carlson*, 812 F.2d 874, 877 (3d Cir. 1987). This Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The district court judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

### **Discussion**

Having reviewed Plaintiff's objections, the Court fails to find that the magistrate judge erred in recommending that the Motion to Dismiss should be granted as to all claims against Defendant Phillips. Plaintiff continues to argue that Defendant Phillips demonstrated deliberate indifference "by not pursuing the surgical repair" and "abandon[ing] the surgical treatment that he knew was necessary . . . ." Pl's Obj. at 8-9.

However, as Defendant Phillips pointed out in his Reply Brief (ECF No. 51), “he could not unilaterally schedule Mr. Wareham for surgery or other care.” In fact, Section 13.2.1 of the Department of Corrections, Access to Health Care Procedures Manual, specifically provides that an off-site specialty consultant will record his findings and recommendations on Form DC-441 and same will be returned to the medical department at the time of the inmate’s return. Thereafter, the Medical Director will review the consultant’s recommendations.<sup>1</sup>

This is the exact procedure Defendant Phillips followed. As reflected in Exhibit A to Plaintiff’s objections, Defendant Phillips completed form DC-441 in which he stated “2nd opinion with Sam Akharon, M.D.” and returned the form to the Medical Director at SCI-Fayette for his review.

The Court finds that Plaintiff’s Objections do not undermine the recommendation of the Magistrate Judge. Thus, the Court will overrule Plaintiff’s objections.

### **Conclusion**

For the reasons stated above, the Objections filed by Plaintiff will be overruled, the Report and Recommendation will be adopted by the Court, and the Motion to Dismiss will be granted.

### **ORDER OF COURT**

**AND NOW**, this 4th day of October, 2013, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

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<sup>1</sup> Public Document located at [www.cor.state.pa.us/DOC](http://www.cor.state.pa.us/DOC) policies.

**IT IS ORDERED** that the Objections filed by Plaintiff are **OVERRULED** and the Report and Recommendation (ECF No. 59) is **ADOPTED** as the Opinion of the Court.

It is **FURTHER ORDERED** that Defendant's motion to dismiss (ECF No. 41) is GRANTED and Dr. Phillips is hereby **DISMISSED** from this lawsuit.

**SO ORDERED** this 4th day of October, 2013.

s/Arthur J. Schwab  
Arthur J. Schwab  
United States District Judge

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